Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LYNN A. SHAFFER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT HIS ACCUSERS?

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IN THE

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LYNN A. SHAFFER,
ELECTRONICS TECHNICIAN CHIEF (E-7),
UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Armed Forces, *United States v. Shaffer*, 46 M.J. 94 (1997), affirming the decision of the Navy-Marine Corps Court of Criminal Appeals is reprinted as Appendix A at Pet. App. 1a. The unpublished opinion of the Navy-Marine Corps Court of Criminal Appeals, *United States v. Shaffer*, No. 94-1137 (N.M.Ct. Crim. App. October 6, 1995) is reprinted as Appendix B at Pet. App. 24a.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals on May 15, 1997 (Appendix A at Pet. App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]

STATEMENT OF THE CASE

Petitioner was tried by a special court-martial composed of officer and enlisted members in June and July of 1993. Contrary to his pleas, he was convicted of two specifications of indecent exposure in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. The members sentenced Appellant to a bad-conduct discharge and reduction in rate to the enlisted paygrade of E-5. In an unpublished opinion, the Navy-Marine Corps Court of Criminal Appeals dismissed Specification 1 of the Charge, but affirmed the finding of guilty to Specification 2 of the Charge, and the sentence. In a published opinion, the Court of Appeals for the Armed Forces affirmed the finding of guilty to Specification 2 of the Charge and the sentence.

Petitioner was a senior career enlisted sailor with perfect 4.0 performance evaluations at the time the allegations of indecent exposure were made. Petitioner's accusers were his neighbors Mrs. Nancy Shields, her two daughters Jennifer and Rhianna, and her two friends Cristina Schuck and Lin Wolfe.

During Petitioner's trial the defense presented evidence of past and current disputes between Petitioner's family and the Shields family. This included evidence that Petitioner's wife had reported Mrs. Shields to a social worker for child neglect; Mrs. Shields had called Petitioner's wife "a fat B" word; and Mrs. Shields' son James threatened Petitioner's daughter at knifepoint. At the time the allegations arose against Petitioner, Mrs. Shields' husband Seaman James Shields had recently been convicted by court-martial for child sexual abuse.

During his *voir dire* of the military jury [members] and during his opening statement, the trial defense counsel articulated the defense theory of the case -- that the Shields family envied and resented Petitioner's successful Naval career because of Mr. Shields' recent court-martial conviction. During *voir dire* the trial defense counsel asked:

> DC: Are you open to the idea that jealously is a very strong emotion, or that it can be a very strong emotion?
>
> DC: Affirmative response from all members.
>
> DC: Are you open to the idea that jealousy can cause neighbors to do nasty

things to each other?

DC: Affirmative response from all members.

Then during opening statement trial defense counsel stated:

> Here we have a 4.0 career sailor, a family man, a fine family man . . . when the smoke is cleared you will see the frightening results of jealousy by neighbors.

At this point in the opening statement, however, the military judge interrupted the trial defense counsel and blocked his attempt to specifically mention James Shields' court-martial conviction and its effect on the Shields family.

Later in the trial while cross-examining Jennifer Shields during the government's case-in-chief, trial defense counsel stated:

> Q. When you lived on Forest Ridge Road, did your mom and dad live with you?
>
> A. Yes.
>
> Q. Does [sic] your mom and dad live with you now?
>
> A. No, just my mom.
>
> Q. When did you move from Georgia to Alabama?

A. In June. I think it was the 12th.

Q. Was your father living with you at that time?

A. No, sir.

Q. When was the last time your father lived with you?

A. I don't remember.

Q. It was in September of last year, right?

A. Yes.

Q. This incident----

The military judge again interrupted the trial defense counsel and, after calling a session in the absence of the members under Article 39(a), UCMJ, 10 USC § 839(a), ordered him to desist that portion of the cross-examination that concerned Mr. Shields.

The subject of Mr. Shields' court-martial conviction surfaced yet again when the military judge *sua sponte* called another Article 39(a) session to preview the proposed defense cross-examination of Mrs. Shields. The trial defense counsel proffered that he wanted to focus on Mr. Shields' problems and the resulting family counseling the Shields family received. Trial defense counsel further argued that:

> counseling . . . tends to show motivation of bias towards Chief Shaffer. During the

> same time frame of these[,] accusations are being made of Chief Shaffer.

Again, the military judge forbade inquiry into Mr. Shields' criminal conviction and its effect on the Shields family.

Finally, during closing argument trial defense counsel stated:

> This is a pitiful tragic case. And our theory, and we believe we've made it clear, the defense, is that poor Nancy Shields, a very competitive figure with five children, she's bitter. She wants to get somebody. And somebody connected to the Navy is more than good enough for her. And she got him.

REASON FOR GRANTING REVIEW

THE MILITARY JUDGE DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT HIS ACCUSERS.

The right of cross-examination is more than a desirable rule of trial procedure. "It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process." Chambers v. Mississippi, 410 U.S. 284 (1972). Indeed, the "rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." Id. at 294. See also Pointer v. Texas, 380 U.S. 400 (1968).

Included in the right to confrontation, is the right to impeach accusers with evidence of bias or motive to misrepresent. This Court has recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986). Such evidence is always relevant because the jury, as fact-finder and judge of credibility, "has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45 (1984). See also Olden v. Kentucky, 488 U.S. 227 (1988); Davis v. Alaska, 415 U.S. 308, 318 (1974). In this case, this time-honored Constitutional right was violated.

Petitioner's entire defense centered around the biases of his accusers -- Mrs. Shields, her two daughters, and her two friends. The defense theory of the case was that the government witnesses conspired to falsely accuse Petitioner of indecent exposure because of envy and bitterness caused by James Shields' court-martial conviction for child sexual abuse. The defense wanted to contrast Chief Shaffer's stellar career with James Shields' conviction and disgrace in order to demonstrate that "intense hatred and jealously on Mrs. Shields part [] motivated her to falsely testify against appellant and to lead the others to falsely testify against him." Shaffer 46 M.J. at 101 (Judge Sullivan, dissenting).

But the military judge stymied Petitioner's timely attempt to introduce this defense theory to the members. In so doing, he deprived Petitioner of a "critical fact pertaining to the credibility of his accusers." Id. at 102. As Judge Sullivan reasoned in his dissenting opinion, the

"family-vendetta" argument "would have been much more plausible to the members if they had known the reason why Mrs. Shields, her children, and her friends hated the Navy and its leaders, i.e., her husbands court-martial for child-sex abuse." Id at 102. The importance of this evidence is magnified by the close nexus in time between James Shields' conviction and the allegations against Petitioner.

Nevertheless, the court below held that Petitioner failed to preserve this issue for appellate review because of an insufficient proffer of evidence. Shaffer, 46 M.J. at 100. In effect, the court claimed that this record of trial fails to demonstrate how Mr. Shields' conviction tied into the defense theory. As Judge Sullivan noted, however, "this theory of the defense was clearly articulated in the defense *voir dire* questions of the members, in defense counsel's opening statement, and in defense counsel's argument to the military judge." Id at 102-103.

Petitioner recognizes that an error at trial stemming from the improper denial of defense evidence is waived unless "the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked." Military Rule of Evidence 103(a)(2), Manual for Courts-Martial, United States 1984. But as the court below and the First Circuit Court of Appeals have recognized, "an offer of proof is unnecessary where the substance and materiality of the excluded evidence are obvious." United States v. Shaffer, 46 M.J. 94, 98 (1997); United States v. Peters, 732 F.2d 1004, 1010 (1st Cir. 1984).

In this case the military judge erred because, irrespective of the quality of Petitioner's proffer, the significance of Mr. Shields' conviction was obvious. Throughout Petitioner's trial the defense counsel repeatedly articulated the defense theory of the case making it clear why evidence of the conviction was critical. Indeed, without the countervailing disgrace of James Shield's court-martial conviction, the members had no rational basis to understand why Mrs. Shields and her daughters were jealous of Petitioner's success.

The error in this case was not merely an evidentiary one. Rather, it involved a violation of Petitioner's constitutional right of confrontation. See Chambers v. Mississippi, 410 U.S. 284, 295 (1972)("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation.") Thus, the appropriate standard of review is *de novo*, not an abuse of discretion standard.

The Court of Appeals for the Armed Forces, however, narrowly analyzed the evidentiary aspect of the issue. The court looked to the attempted cross-examination and its supposed insufficient proffer, and decided the case under an abuse of discretion standard. The court failed to recognize that in light of the *entire* record, this issue was of constitutional significance and therefore warranted *de novo* review. This was a critical failure because the purpose and relevance of the defense evidence was "obvious." Shaffer, 46 M.J. at 98.

Conclusion

Trial defense counsel clearly articulated in his *voir dire* of the members, his opening statement, and his attempted cross-examination of government witnesses, that he sought to expose a proto-typical form of bias on the part of Petitioner's accusers. The Shields family was going down in disgrace. They wanted to take Petitioner's family with them. The old adage "misery loves company" fits in this case. Mrs. Shields and her daughters and friends were jealous of Petitioner's stellar career and family life. To expose their biases the defense needed to introduce evidence of Mr. Shields' court-martial conviction. Yet the information never got before the members.

Hence, Petitioner's rights to confrontation and to present a defense were violated. The evidence he sought to admit -- through cross-examination *and* in his own case-in-chief -- was critical to understanding his defense theory. As noted below by Judge Sullivan, a "significant constitutional error occurred in this case, and evidentiary rhetoric aside, appellant was thereby denied a fair trial." Shaffer, 46 M.J. at 101 (Judge Sullivan dissenting).

This Court should grant review of this petition.

Respectfully submitted,

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August 1997

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[1] Charles Hairston, a third year law student at Emory University in Atlanta, Georgia, contributed to the preparation of this petition.

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 96-0229

Crim.App. No. 94 1137

United States, *Appellee*

v.

Lynn A. SHAFFER, Electronics Technician Chief, U.S. Navy, *Appellant*

Argued Nov. 5, 1996

Decided May 15, 1997

For Appellant: *Mary T. Hall*, (argued); and *Lieutenant Steven B. Fillman*, JAGC, USNR.

For Appellee: *Lieutenant David M. Harrison*, JAGC, USN (argued); *Colonel Charles Wm. Dorman*, USMC (on brief).

Opinion of the Court

COX, Chief Judge:

In June and July of 1993, appellant was tried by a

special court-martial composed of officer and enlisted members sitting at Naval Submarine Base, Kings Bay, Georgia. Contrary to his pleas, he was convicted of indecent exposure (2 specifications), in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. The members sentenced appellant to a bad-conduct discharge and reduction to E-5. The convening authority approved the sentence.

In an unpublished opinion, the Court of Criminal Appeals dismissed specification 1 of the Charge, but affirmed the findings of guilty to specification 2 of the Charge,[1] and affirmed the sentence. We granted review of the following questions of law:

I

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN CONCLUDING THAT THE EVIDENCE UNDER SPECIFICATION 2 WAS SUFFICIENT, AS A MATTER OF LAW, TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

II

WHETHER THE LOWER COURT ERRED IN FINDING THAT THE RECORD DID NOT SUPPORT THE ERROR ASSIGNED BELOW

---

[1] Specification 2 states that appellant "did, at Kingsland, Georgia, on diverse occasions from about May through December 1992, while standing in or near an open garage at ... [his residence], willfully and wrongfully expose in an indecent manner to public view his buttocks and penis."

THAT THE MILITARY JUDGE VIOLATED APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN HE REFUSED TO LET THE TRIAL DEFENSE COUNSEL CROSS-EXAMINE JENNIFER SHIELDS AS TO THE IMPACT OF JAMES SHIELDS' COURT-MARTIAL ON HER MOTIVE TO LIE OR HER ABILITY TO ACCURATELY RECALL EVENTS.

We hold that the evidence is legally sufficient to support the findings of guilty to specification 2. We also hold that, on this record, the military judge did not violate appellant's Sixth Amendment right of confrontation.

SUFFICIENCY OF THE EVIDENCE

While the Courts of Criminal Appeals review courts-martial for both legal and factual sufficiency, this Court reviews only for legal sufficiency. *Compare* Art. 66(c) *with* Art. 67(c), UCMJ, 10 USC §§ 866(c) and 867(c)(1989), respectively. The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (CMA 1987), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

In this regard, the record reveals the following evidence adduced by the Government with respect to specification 2: Three witnesses (Ms. Cristina Schuck, Ms. Lin Wolfe, and Mrs. Nancy Shields) testified that, while driving by appellant's home on an afternoon in

1992, each saw appellant standing completely naked in the back of his garage. The garage door was open; appellant was facing the street:; and he was looking in the witness' direction. He did not cover his groin or otherwise attempt to remove himself from view on any of these occasions. This happened a total of four separate times (once in May or June; once in June; and twice in November).

Mrs. Shields said she observed appellant's actions in November. Jennifer Shields, Mrs. Shields' daughter (10 years old at the time of trial), testified that, in October of 1992 and again "around Christmas" in 1992, she saw appellant naked. One time, he was standing in his open garage and facing the street. The other time, he was standing outside the garage. According to Jennifer, "[H]e was standing with the fence door wide open and in between the gate of the fence looking out at the street." Another of Mrs. Shields' daughters, Rhianna (9 years old at the time of trial), testified that she saw appellant naked on three separate occasions during the same time frame. Each time, he was standing and facing the street through his open garage. One time, he said "Hi" to Rhianna as she walked by.

Appellant argues that this evidence is legally insufficient to support his conviction for indecent exposure. Specifically, he argues that the evidence fails to establish that his exposures were willful. We disagree.

The offense of indecent exposure requires proof of the following three elements:

(1) that the accused exposed a certain part of the

accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Para. 88b, Part IV, Manual for Courts-Martial, United States (1995 ed.).

"Willful" means "an intentional exposure to public view," while "indecent" signifies "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." Paras. 88c and 90c, Part IV.

In *United States v. Choate*, 32 MJ 4423, 425 n. 3 (1991), we observed that "[o]ur decisions addressing prosecutions for indecent exposure have generally relied on the state court decisions representing the majority approach to this crime." Those decisions make it clear that the required criminal intent for indecent exposure "is usually established by some action by which a defendant draws attention to his exposed condition or by a display in a place so public that it must be presumed it was intended to be seen by others." *United States v. Stackhouse*, 16 USCMA 479, 481, 37 CMR 99, 101, quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. Mun. App. 1962).

Quoting *State v. Perry*, 224 Minn. 346, 28 N.W.2d 851, 854 (1947), we also noted in *Stackhouse* the following:

> To establish intent where the act does not occur in a public place or otherwise where it is certain to be observed, some evidence further than the act itself must be presented. Ordinarily, intent is established by evidence of motions, signals, sounds, or other actions by the accused designed to attract attention to his exposed condition, or by his display in a place so public and open that it must be reasonably presumed that it was intended to be witnessed.

16 USCMA at 482, 37 CMR at 102.

As is readily apparent from the quoted cases, the fact that appellant's exposures took place in and on his private property is of no particular moment. The offense of indecent exposure does not just apply to exposures that take place on traditionally public lands or in traditionally public buildings. The offense also applies to indecent exposures that occur in places "so public and open," including privately-owned homes, that they are "certain to be observed" by the general population. *See State v. Whitaker*, 164 Ariz. 359, 793 P.2d 116, 119-20 (App. 1990) (public-indecency statute's proscriptions can be committed in one's own home); *State v. Chiles*, 53 Wash. App. 452, 767 P.2d 597 (1989) (room with unveiled window on second floor of defendant's home was "public place" within meaning of public-indecency statute); *Collins v. State*, 160 Ga.App. 680, 288 S.E.2d 43 (1981)(public-indecency conviction upheld where defendant sunbathed in the nude on his back porch); *cf.*

State v. Romero, 103 N.M. 532, 710 P.2d 99 (app. 1985) (indecent-exposure conviction reserved where conduct occurred in defendant's home but was not subject to view by persons outside the home).

In this case, evidence was adduced showing that appellant exposed himself while standing in his open garage (or next to his fence). The garage was attached to his home, faced the street, was large enough to hold two cars, and was located in a well-developed, residential community. School buses and automobiles drove by on a regular basis, and children routinely passed by on foot and on their bicycles. Other families' homes were located directly alongside of and across the street from appellant's home. From these facts, the panel could reasonably conclude that appellant's exposures took place in "public view." *See* para. 88b(1), Part IV.

Further, on each of these occasions, appellant was described as facing out of his open garage, towards the street, in unobstructed view, during daytime-lighted hours. Each time, he just stood there, naked. He never covered himself up or removed himself from view when seen. From these facts, the panel could reasonably conclude that appellant knew the garage was open and knew he could be seen by others. He was not, for example, merely reaching to place something on a shelf, as he had been during the January 1993 incident charged as specification 1. Consequently, the panel could also reasonably conclude that, on each occasion, appellant was in the garage, or near it, for the sole purpose of exposing himself to the public.

Thus, we hold that the evidence is legally

sufficient to support the panel's conclusion that appellant's exposures were "willful" and "wrongful." *See* para. 88b(2), Part IV; *see also* 50 Am.Jur.2d, Lewdness, Indecency, and Obscenity § 17 at 291 (1995) ("Statutes have generally adopted the common-law requirements of the offense of indecent exposure, there must be shown a wilful and intentional exposure of the private parts of the body."); *Dill v. State*, 24 Md.App. 695, 332 A.2d 690, 693 (1975)("[A]t the common law indecent exposure was the wilful intentional exposure of the private parts of one's body in a public place ...."); *compare Duvallon v. District of Columbia*, 515 A.2d 724 (D.C. 1986)(intentional exposure of the buttocks held not to be indecent because not an exposure of the genitals), *with United States v. Choate*, *supra* (exposure of buttocks held indecent under the circumstances under Article 134).

The same apparently cannot be said about the incident charged in specification 1. Although we do not review the sufficiency of the evidence associated with specification 1, we note that, in dismissing that specification the court below found the following:

> At most, the evidence only shows a brief, accidental, innocent exposure. We have no reason to doubt the testimony of the two girls. Evidence from those two witnesses does nothing more than support the testimony of the appellant that he stepped briefly into his garage to put magazines on a shelf and that he was unaware that the garage door was open or that anyone could see him.

Unpub. op. at 3. *Accord United States v. Stackhouse,*

supra. We conclude that the evidence supporting specification 2 of the Charge, however, is legally sufficient, so the first granted issue is answered in the negative.

RIGHT OF CONFRONTATION

The second granted issue concerns civilian defense counsel's attempt to interject into the record evidence that Jennifer Shields' father (Nancy Shields' husband) was court-martial for engaging in sex-related offenses with his adopted daughter.[2] The military judge prohibited civilian defense counsel from doing so, and appellant labels this a violation of his right of confrontation. We disagree.

Error may not be predicated upon a ruling that excludes evidence unless "the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked." Mil.R.Evid. 103(a)(2), Manual, *supra*, "An offer of proof allows the military judge to make an informed ruling and permits the appellate courts to review that ruling to determine whether exclusion of the evidence resulted in reversible error." *United States v. Means*, 24 MJ 160, 162 (CMA 1987). An offer of proof is unnecessary "where the substance and materiality of the excluded evidence are obvious." *Id.*, quoting *United States v. Peters*, 732 F.2d 1004, 1010 (1st Cir. 1984). "When it is not obvious, however, an offer of proof is

---

[2] The promulgating order from that court-martial was not introduced into evidence at appellant's court-martial and is not before us. Consequently, while we assume that Mr. Shields was convicted of sex-related offenses, we do not assume they were similar to appellant's offense.

required to clearly and specifically identify the evidence sought to be admitted and its significance." *United States v. Hayes*, 36 MJ 361, 363 (CMA 1993), quoting *Means*, *supra* at 162-63.

We review trial rulings limiting cross-examination for abuse of discretion. *United States v. Buenaventura*, 45 MJ 72, 79 (1996). In addition to the substance, the relevance of excluded evidence must also be obvious from the record before this Court will find an abuse of discretion in excluding it. *See United States v. Means* and *United States v. Hayes*, both *supra*; *see also United States v. Sager*, 36 MJ 137, 146 (CMA 1992) (Court will not speculate about "extra-record premise"); *United States v. Harrison*, 26 MJ 474, 476 (CMA 1988)(Court cannot countenance "post-trial speculation"); *see generally* Art. 67. Here, neither is obvious.

The subject of Mr. Shields' misconduct or court-martial came up three times during appellant's court-martial. The first time, civilian defense counsel, during his opening statement, started to say:

> In May and June of 1992, when the initial allegations of indecent exposure misconduct was [sic] made against Chief Shaffer, that is the precise time frame that Nancy Shields' husband was charged with---

At that point, trial counsel objected, and the military judge responded, "I am not going to let it in until there is foundation showing relevancy, Mr. Nelms. Please move on to another issue" As directed, civilian defense counsel moved on to another matter; he made no offer of proof or argument regarding the relevance of

Mr. Shields' alleged misconduct to appellant's case. Lacking such a proffer, appellant does not here argue that the military judge erred in precluding counsel's reference to Mr. Shields' misconduct at that point.

The second time civilian defense counsel apparently began to broach the subject of Mr. Shields' misconduct or court-martial and the occasion here in issue-occurred during his cross-examination of Jennifer Shields. Civilian defense counsel asked Jennifer the following questions:

Q. When you lived on Forest Ridge Road, did your mom and dad live with you?

A. Yes.

Q. Does [sic] your mom and dad live with you now?

A. No, just my mom.

Q. When did you move from Georgia to Alabama?

A. In June. I think it was the 12th.

Q. Was your father living with you at that time?

A. No, sir.

Q. When was the last time your father lived with you?

A. I don't remember.

Q. It was in September of last year, right?

A. Yes.

Q. This incident--

MJ: Mr. Nelms--do you want to take a little break?

WIT: Yes.

(Emphasis added.) The military judge then recessed the court-martial.

In a session under Article 39(a), UCMJ, 10 USC § 839(a), trial counsel objected on relevance grounds, and he requested

> some type of instruction from the judge. I think the defense has pushed the envelope on the relevance of the father.

The military judge agreed, stating:

> I was waiting on a government objection. It seems to be a calculated effort to upset the witness and get the witness in emotional turmoil before you turn to the issues at hand. I want it stopped.

Thus for a second time, the military judge clearly notified defense counsel that the relevance, if any, of Mr. Shields' misconduct was not apparent to the court. Defense counsel did not object or otherwise protest, and he did not offer any explanation of such relevance. When proceedings on the merits resumed, counsel moved immediately on to questioning Jennifer about appellant's alleged indecent exposures.

When the subject of Mr. Shields' misconduct came up the third time, it was not even initiated by defense counsel, but by the military judge himself. After Mrs. Shields completed her testimony on direct examination for the prosecution, but before cross-examination, the military judge *sua sponte* convened an Article (39a) session, where he stated to civilian defense counsel:

> I want to preview, before allowing some of this to go before the members. I want to focus on the area you want to get into with regard to psychiatric counseling or whatever. I want to see what we got outside of the members and I will deal with it now.

Whether defense counsel had signaled such an intent or whether the military judge simply decided it was time to force defense counsel to finally make it a matter of record cannot be determined from this record. Counsel's theory, it turns out, was that, due to Mr. Shields' own problems, the Shields family generally received counseling on several occasions. Counsel argued that, in some unspecified way, this

> counseling ... tends to show motivation of bias towards Chief Shaffer. During the same frame of these[,] accusations are being made of Chief Shaffer.

During defense counsel's rambling voir dire of Mrs. Shields, which strayed regularly from the subject of Mr. Shields' difficulties, the military judge interjected:

> As I started to say a few minutes ago, I called

> this session not to preview your entire cross but to review the issue of whether I will allow any testimony whatsoever with respect to any psychiatric counsel or with respect to the details of charges against this lady's husband which events took place in [sic] sometime in '92.

Ultimately, after defense counsel managed only to reiterate the fact that Mrs. Shields had been counseled with respect to her husband's misconduct, the military judge ruled:

> The fact that this witness was counseled is, in my view, absolutely irrelevant to the issue that is before the court today. The fact that the children may have had some conversation with the Child Protective Services worker relating to the problems that was [sic] present in their home at that time, or in a preceding time and may be still ongoing during some of the events that transpired here, is again, irrelevant. I don't want any questioning on those issues before the jury. As far as relationships between the family or attitudes or whatever--if there is a basis for bias, you may inquire into it. That is the ruling I have on that.

No error is here asserted with respect to this ruling prohibiting the questioning of Mrs. Shields about her husband's difficulties.

With regard to the issue before this Court--the military judge's supposed limitation of the questioning of Jennifer--it is not obvious that counsel was actually intending to elicit from her testimony about Mr. Shields' misconduct or court-martial. Counsel's words, "This

incident---," are ambiguous and may well have referred to one or more of the incidents involving appellant, especially since counsel was on notice that a showing of relevance was prerequisite to questioning about the father and counsel had not undertaken such a showing.

But even if such an intent was obvious, the burden was on the defense, as proponent of the evidence, *see United States v. Shover*, 45 MJ 119, 122-23 (1996), to establish its relevance to an issue in this case. Mil.R.Evid. 402. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that[n] it would be without the evidence." Mil.R.Evid. 401. Without a timely proffer, appellant cannot now fairly complain that the judge improperly precluded the questioning.

On appeal, appellant argues that, during cross-examination of Jennifer Shields, counsel was indeed referring to Mr. Shields' problems; that counsel was in fact intending to cross-examine Jennifer about her father's court-martial or misconduct; that the military judge was on notice of how counsel intended to proceed; and that the military judge erred in precluding this examination.

Appellant further argues that evidence of Mr. Shields' misconduct would have shown that the Shields women were lying about appellant. Specifically, he now asserts that they had a motive to lie because of their "resentment and jealousy of [appellant and his] family." He further suggests that the Shields women resented and were jealous of him because the Shields family was tormented and dysfunctional while appellant's family

was "all-American" and trouble-free. Finally, he offers that one of the reasons the Shields family was tormented and dysfunctional was because Mr. Shields sexually assaulted his step-daughter. In short, appellant's argument before this Court bears no resemblance whatever to the position advanced at trial--that relevance, in some way, sprang from the fact of counseling. We can hardly hold the military judge to a standard of prescience.

Appellate embellishment notwithstanding, moreover, we can still discern no abuse of discretion by the military judge concerning his determination that insufficient nexus was shown between appellant's and Mr. Shields' crimes, or between Mr. Shields' crimes and the Shields women's alleged motivation to perjure themselves at the expense of an innocent neighbor. This is especially so where, as here, the judge permitted full cross-examination of the witnesses regarding their attitudes and possible bias against appellant and his family. At its very best, this speculation appellant sought to inject into his trial could have been "only *marginally* relevant to a *possible* argument that defense counsel *might* make concerning a *possible* motive to explain" why the Shields women would lie. *See United States v. Lehman*, 756 F.2d 725, 728 (9th Cir. 1985) (emphasis added). The second granted issue is also answered in the negative.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Judges CRAWFORD, GIERKE, and EFFRON concur.

SULLIVAN, Judge (dissenting):

The majority resolves Issue II on the basis that defense counsel did not articulate why the precluded cross-examination of a prosecution witness (Jennifer Shields) about her father's recent court-martial for child-sexual abuse was relevant. *See* Mil. R. Evid. 401, Manual for Courts-Martial, United States, 1984 (Evidence is relevant when it has "*any tendency* to make the existence *of any fact that is of consequence* to the determination of the action *more probable or less probable*. . . ." (Emphasis added.)), and Mil.R.Evid. 402. In my view, the relevance of the desired cross-examination to show a motive for the testimony of this young witness and of the rest of her family and friends against appellant was obvious. *See* Mil. R. Evid. 103(a)(2) ("[[T]he substance of the evidence . . . was apparent from the context within which the questions were asked."). Moreover, the majority's alternative application of Mil. R. Evid. 401 to approve suppression of this vital defense evidence violates well-established civilian and military precedent. *See generally* S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 422 (3d ed. 1991) (Mil. R. Evid. 401 favors admission, and "anything that can help rationally decide disputed issues is relevant.").

Finally, the majority suggests that, assuming some relevance of this cross-examination, it was so marginal a matter that no error can be found in its prohibition. *See* Mil. R. Evid. 403. I disagree with this conclusion and would hold that the probative value of the desired cross-examination was substantial. *See United States v. Gray*, 40 MJ 77 (CMA 1944); *State v. Helms*, 322 N.C. 315, 367 S.E. 2d 644, 647 (1988); *State v. Schmidt*, 288 S.C.

301, 342 S.E. 2d 401, 403 (1986). In my view, significant constitutional error occurred in this case, and evidentiary rhetoric aside, appellant was thereby denied a fair trial. *See Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Appellant stands convicted of a single specification of indecently exposing himself to neighborhood children and women on divers occasions between May and December 1992. Evidence of his guilt was provided by Mrs. Nancy Shields, her two daughters, Rhiana Shields and Jennifer Shields, and her two friends, Lin Wolfe and Cristina Schuck. Appellant denied having ever been nude in his garage at any time prior to his accidental exposure of January 7, 1993. No two of the government witnesses testified to seeing appellant nude in his garage on the same occasion.

The majority concludes that civilian defense counsel failed to articulate a theory of relevance for cross-examining young Jennifer Shields about her father's conviction for child-sexual abuse. I am not convinced that this conclusion is appropriate in light of the military judge's repeated squelching of this area of inquiry. *See State v. Schmidt, supra.* Later at this court-martial, defense counsel, at a session under Article 39(a), Uniform Code of Military Justice, 10 USC § 839(a), called prior to cross-examination of her mother, Mrs. Shields, did identify the evidence he sought concerning the former Seaman Shields' conviction. He asked Mrs. Shields the following questions:

ICC[*]: Is it true that Heather was adopted by

your husband Seaman James Shields?

WITNESS: Yes.

ICC: And she is 15 years old?

WITNESS: Yes.

ICC: Last May, isn't it true that Heather accused her father of sodomy, indecent acts, incest, and carnal knowledge?

WITNESS: Yes.

ICC: In May of '92?

WITNESS: April.

ICC: In September of '92, isn't it true that he pled guilty to the acts of sodomy, carnal knowledge, and incest with his daughter and was sentenced to five years?

WITNESS: Yes.

* ICC: Individual Civilian Counsel

ICC: He hasn't been a member of your household since, has he?

WITNESS: No.

The military judge, however, signaled at that time and repeatedly throughout the trial that he was not inclined to allow this evidence to go before the members.

Appellant's defense was that the government witnesses were falsely accusing him of indecently exposing himself and conspiring among themselves to secure his conviction of this offense. To have any chance of succeeding on this theory, he had to show *why* so many people (Mrs. Shields, her two daughters, and her two friends) would perjure themselves. The defense strategy was to introduce the above evidence to show *intense hatred and jealousy* on Mrs. Shields' part towards appellant's family, which *motivated* her to falsely testify against appellant and to lead the others to falsely testify against him. This theory of the defense was clearly articulated in the defense *voir dire* questions of the members, in defense counsel's opening statement, and in defense counsel's argument to the military judge ("[I]t tends to show motivation of bias toward Chief Shaffer.").

To establish this conspiracy of lies, the defense attempted to proffer some reasons why Mrs. Shields and the others hated and envied appellant's family. The defense's initial approach to this question was to show that Mrs. Shields was a neighbor of appellant who resented Chief Shaffer's success in the Navy and his family's good name in the local Navy community. The defense hoped to establish this fact circumstantially by contrasting Chief Shaffer's outstanding naval success and family reputation with Seaman Shields' court-martial and family disgrace, including counseling by state protective-service officers as a result of Seaman Shields' misconduct. It also attempted to show that the downfall of the Shields' family occurred at approximately the same time that the Shields' complaints against appellant began to surface. Finally, the defense attempted to show that Seaman Shields' court-martial for child-sexual abuse

was for sexual offenses generally related to the charges against appellant, *i.e.*, indecent sexual exposure to children.

This was clearly relevant cross-examination into bias and motive to lie on the part of the prosecution's witnesses. *State v. Helms*, 367 S.E. 2d at 647 (evidence showing why mother of child-sex victim would suborn perjury in her children relevant in child-abuse case); *State v. Schmidt*, 342 S.E. 2d at 403 (evidence showing family vendetta relevant in child-sexual-abuse case); *see generally United States v. Gray*, 40 MJ at 81 (error to exclude evidence that prosecution witnesses complained against the accused to draw attention away from their own dysfunctional and abusive family situation). The law is well-settled on this question.

Nevertheless, the military judge repeatedly rebuffed any attempt by the defense to bring the court-martial of Seaman Shields to the attention of the members. Exclusion of this defense-cross-examination evidence deprived appellant of vital support for his attack on Jennifer Shields' credibility and that of the other witnesses in the Shields' camp. Defense counsel's closing argument made clear the need for this evidence, as follows:

> This is a pitiful, tragic case. And our theory, and we believe we've made it clear, the defense, is that poor Nancy Shields, a very competitive figure with five children, she's bitter. She wants to get somebody. And somebody connected to the Navy is more than good enough for her. And she got him. She had to recruit two other women to help her, but she got him.

This family-"vendetta" argument, in my opinion, would have been much more plausible to the members if they had known the reason why Mrs. Shields, her children, and her friends hated the Navy and its leaders, *i.e.*, her husband's court-martial for child-sex abuse. *See State v. Helms* and *State v. Schmidt*, both *supra*. Moreover, appellant's status as a senior enlisted man, a 4.0 sailor, and a well-thought-of Navy family man made his selection as the object of Mrs. Shields' averred fury eminently reasonable. *See United States v. Bahr*, 33 MJ 228, 233 (CMA 1991). Finally, the nexus in time and nature between Mr. Shields' court-martial and the Shields' complaints against appellant is undeniable and tended to enhance the probative value of this evidence. *See United States v. Gray*, *supra* at 81. I see substantial prejudice from denying this evidence to the defense.

The majority's hyper-technical reading of the record of trial ignores the reality of appellant's court-martial. In my view, defense counsel was discouraged, if not intimidated, by the military judge from presenting a viable avenue of defense. Assuming defense counsel was not pressured into forgoing this avenue of defense, I would still vote to reverse the decision below in this case. A servicemember is entitled to be represented by a competent lawyer who can distinguish the forest for the trees. *See United States v. McCastle*, 43 MJ 438, 441 (1996) (Sullivan, J., dissenting) ("[D]efense counsel saw hoof prints and looked for a rare zebra instead of an obvious horse."). Here, a critical fact pertaining to the credibility of appellant's accusers was hidden from the members, and I can discern no reason why a diligent defense counsel would allow this to happen. *See generally Davis v. Alaska*, 415 U.S. 308, 316 (1974); *see also United States v. Straight*, 42 MJ 244, 251 (1995)

(defense counsel's decision to forgo requesting post-trial session regarding court member's discussion of parole eligibility held deficient). In our military-justice system, an accused should be able to put on his full defense. *United States v. Rankin*, 34 MJ 326, 336 (CMA 1992) (Sullivan, C.J., dissenting). Here, appellant was denied a fair trial.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

P.J. McLAUGHLIN W.A. DeCICCO
WILLIAM J. LUCAS

UNITED STATES

v.

Lynn A. SHAFFER, 343 54 0931
Electronics Technician Chief (E-7), U.S. Navy

NMCM 94 01137 Decided 6 October 1995

Sentence adjudged 21 August 1993. Military Judge: F.G. De Rocher. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Submarine Group TEN, Kings Bay, GA.

CDR M.T. HALL, JAGC, USN, Appellate Defense Counsel

LT DAVID M. HARRISON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

Contrary to his pleas, this married 13-year veteran of the Navy's submarine service was convicted by a special court-martial composed of officer and enlisted members of indecently exposing himself on 7 January 1993 to two 10-year-old neighbor girls (Specification 1) and of indecently exposing himself to neighborhood children and women on divers occasions during the period from May to December 1992 (Specification 2) in violation of Article 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 934. The appellant was sentenced to be reduced from pay grade E-7 to E-5 and to be separated from the Navy with a bad-conduct discharge. The appellant presents this Court with 12 assignments of error.[1]

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[1] I. THE EVIDENCE UNDER SPECIFICATION 1 IS INSUFFICIENT TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

II. THE EVIDENCE UNDER SPECIFICATION 2 IS INSUFFICIENT TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

III. THE MILITARY JUDGE ERRED IN RULING ON THE ADMISSIBILITY OF THE DEFENSE VIDEO TAPE AT AN 802 CONFERENCE.

IV. THE MILITARY JUDGE ERRED IN EXCLUDING THE DEFENSE VIDEO TAPE OF APPELLANT'S NEIGHBORHOOD AND GARAGE.

V. THE MILITARY JUDGE VIOLATED APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN HE REFUSED TO LET THE TRIAL DEFENSE COUNSEL CROSS-EXAMINE JENNIFER SHIELDS AS TO THE IMPACT OF JAMES SHIELDS' COURT-MARTIAL ON HER MOTIVE TO LIE OR ON HER ABILITY TO ACCURATELY RECALL EVENTS.

VI. A SENTENCE WHICH INCLUDED AN UNSUSPENDED BAD-CONDUCT DISCHARGE WAS INAPPROPRIATELY

SEVERE UNDER THE FACTS OF THIS CASE.

VII. THE STAFF JUDGE ADVOCATE ERRONEOUSLY ADVISED THE CONVENING AUTHORITY AS TO HIS RESPONSIBILITIES WITH REGARD TO SENTENCE APPROVAL; SHE ADVISED HIM TO APPROVE THE PUNITIVE DISCHARGE BASED ONLY ON THE NATURE OF THE OFFENSES RATHER THAN ADVISING HIM OF HIS REQUIRED COMPLIANCE WITH R.C.M. 1107(d)(2).

XIII. [SIC]THE STAFF JUDGE'S ADVOCATE [SIC] RECOMMENDATION FAILS TO ADVISE THE CONVENING AUTHORITY THAT CHIEF SHAFFER HAD RECEIVED THE NAVY ACHIEVEMENT MEDAL (DEF. EX. Y) AND A SECOND NAVY UNIT COMMENDATION (DEF. EX. I).

IX. CIVILIAN DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN ADVISING APPELLANT TO ELECT TRIAL BY ENLISTED MEMBERS. (Footnote omitted)

X. CIVILIAN DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PROCURE A PSYCHIATRIC EVALUATION ON APPELLANT. (Footnote omitted.)

XI. COMMANDER, SUBMARINE GROUP TEN EXERCISED UNLAWFUL COMMAND INFLUENCE BY ORDERING APPELLANT'S TAD TRANSFER ASHORE FOR DISCIPLINARY PURPOSES AFTER APPELLANT'S IMMEDIATE COMMANDING OFFICER HAD DETERMINED THAT THE CHARGES WERE WITHOUT BASIS AND AFTER THE LOCAL DISTRICT ATTORNEY HAD DECLINED PROSECUTION; THIS IS SUPPORTED BY THE MILITARY JUDGE'S STATEMENT THAT "SEXUAL MISCONDUCT ALLEGATIONS AROSE AT THE SUB BASE WELL OUT OF PROPORTION TO ANY REASONABLE PROBABILITY SUGGESTED BY DEMOGRAPHICS" (OFFERED PURSUANT TO *United States v. Gunter*, 34 M.J. 183 (C.M.A. 1992), IN APPELLANT'S MOTION TO ATTACH DOCUMENTS). (Footnote omitted.)

XII. THE RECORD IS INCOMPLETE AND/OR INACCURATE

We find merit in appellant's first assignment of error that the evidence regarding Specification 1 is insufficient to support a finding of guilty beyond a reasonable doubt.

The offense of indecent exposure requires that a person expose their body to public view in an indecent manner and that the exposure be willful and wrongful. Willful means intentional. Indecent means grossly vulgar, obscene, and repugnant to common propriety and that which tends to excite lust and deprave the morals. Even if indecent, a negligent exposure is not punishable. Manual for Courts-Martial [MCM], United States, 1984, Part IV, ¶ 88, (1994 ed.).

The appellant testified that during the afternoon of 7 January 1993, while naked and home alone, he stepped briefly from the living area of his home into his garage to place some magazines on a shelf. He indicated that he was unaware that the garage door was open or that anyone could see him. He further indicated that it took only seconds to put the magazines in the garage. Record at 275-83.

DUE TO THE OMISSION OF VIDEO TAPE WHICH FORMED THE BASIS OF APPELLATE EXHIBIT III, IT CONTAINS ONLY A DESCRIPTION RATHER THAN A PHOTOGRAPH OF DEF. EX. BBB, THE SHORTS IN QUESTION FORMING SUCH A CRITICAL ELEMENT OF THE DEFENSE CASE; IT FAILS TO ACCOUNT FOR GAPS IN THE LETTERING OF THE VARIOUS DEFENSE EXHIBITS; IT DOES NOT INCLUDE AT LEAST ONE DEFENSE EXHIBIT WHICH WAS NOT OFFERED BUT WHICH WAS SHOWN TO A WITNESS; AND BECAUSE THE COURT REPORTER INDICATED THAT DEF. EX. PPP WAS NOT ADMITTED WHEN, IN FACT, IT WAS (RECORD AT 70). (Footnote omitted.)

Two 10-year-old neighbor girls testified that on that date at about the same time they had just gotten off their school bus and were walking in the street past the appellant's house. One of the girls, Brandi, testified that the appellant's garage door was open and the appellant was inside the garage naked. She indicated that the appellant appeared to be reaching for a shelf. She testified that she saw frontal view of the appellant, including genital area, for a couple of seconds then ran home to tell her mother what she had seen. She also testified that she did not believe that the appellant exposed himself intentionally. Record at 58-76.

The second girl, Jennifer, testified that she was walking home from the school bus stop with Brandi and for a couple of seconds saw the appellant naked in his garage. She saw only a view of the appellant's side and back-side. Jennifer also testified that the appellant appeared to be bending over. Jennifer then ran home to tell her mom what she had seen. Record at 76-78; 83-85. Neither girl testified that the appellant was looking at them or even looking in the direction of the street.

This Court may affirm only those findings of guilty as we find correct in law and fact. Article 66(c), UCMJ. The test for legal sufficiency is whether any reasonable factfinder, considering the evidence in the light most favorable to the Government, could find all the elements of the offense beyond a reasonable doubt. The test for factual sufficiency is whether, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. Specification 1 fails on both counts. There is insufficient evidence to establish that

the exposure was either willful or indecent. At most, the evidence only shows a brief, accidental, innocent exposure. We have no reason to doubt the testimony of the two girls. Evidence from those two witnesses does nothing more than support the testimony of the appellant that he stepped briefly into his garage to put magazines on a shelf and that he was unaware that the garage door was open or that anyone could see him. We will set aside the finding of guilty for Specification 1 in our decretal paragraph.

Assignment of Error III concerns a defense videotape of the appellant's home and garage areas. The appellant contends that the trial judge improperly ruled on the admissibility of the video tape during an off-the-record conference held pursuant to Rule for Courts-Martial [R.C.M.] 802, MCM. Use of the videotape was discussed at such a conference. During a subsequent Article 39(a), UCMJ, session the trial judge referred to the R.C.M. 802 conference and ruled at that time that the members were not going to be permitted to see the videotape. Record at 27.

All sessions involving rulings by a military judge must be made part of the record. R.C.M. 801(f). R.C.M. 802 conferences need not be made part of the record, but matters agreed upon at such a conference must be included in the record. Failure of a party to object at trial to the adequacy of such an inclusion in the record constitutes waiver. R.C.M. 802(b). We find that although the admissibility of the videotape was discussed during the R.C.M. 802 conference, the admissibility ruling was made on the record. Additionally, by not making a timely objection, the appellant waived any error the judge may have committed in not completely

documenting what occurred during the R.C.M. 802 conference. Assignment of Error III has no merit.

Assignment of Error IV alleges that the trial judge erred in excluding the videotape of the appellant's house and garage. We note that the defense elected not to mark the videotape as an exhibit, make an offer of proof following the judge's ruling excluding the videotape, or offer the videotape at a later point during the trial. We also note that 11 photographs of the appellant's garage area were admitted as defense exhibits and used extensively throughout the trial. Defense Exhibits GGG through NNN, ZZZ, BBBB, and CCCC. Under the circumstances, we find no error in the judge's ruling or, if there was error, it was not prejudicial and was waived. Assignment of Error IV is therefore without merit.

Assignment of Error V alleges that the trial judge denied the appellant his right guaranteed by the Sixth Amendment to the United States Constitution to confront a witness against him by prohibiting the cross-examination of the prosecution witness, Jennifer, about the court-martial of her father. Jennifer, age 10, testified as a prosecution witness that in addition to the incident on 7 January 1993, she had seen the appellant standing naked in his garage with the door open on two prior occasions as she passed the house. She was unsure of the dates but indicated that the events occurred during October and December of 1992. In his assignment of error, the appellant indicates that Jennifer's father had been convicted by court-martial during the summer of 1992 for committing serious sex offenses with Jennifer's older sister. Appellant contends that he was barred from cross-examining Jennifer about the conviction and was

thus precluded from demonstrating Jennifer's bias against the appellant's family and her motive to misrepresent. The appellant contends that cross-examination into that area would have shown that Jennifer resented what some witnesses described as the "All-American" Shaffer family and also that she understood the criminal justice system and knew that making allegations against the appellant, true or not, would get him in trouble. She thus had a bias against the appellant and motivation to lie.

The record does not support the Assignment of Error V. During the civilian defense counsel's opening statement, he began to tell the members about Jennifer's father but was cut short by an objection. Record at 50. The judge sustained the objection absent a showing by the defense of relevancy. The issue was dropped by counsel. Later, during cross-examination, the civilian defense counsel began questioning Jennifer about her father. Record at 82. The witness became upset and a short recess was called. There is no indication in the record either before or after the recess that the appellant was attempting to cross-examine Jennifer about her father's conviction. It is the responsibility of the defense to adequately notify the trial judge of its desire to conduct certain cross-examination, to lay the proper foundation, and to make an effective offer of proof if such an attempt is denied by the judge. Military Rule of Evidence [Mil. R. Evid.] 103(a)(2), MCM. The defense elected not to proceed down that path. The confrontation issue regarding Jennifer was waived. Assignment of Error V therefore has no merit.

We disagree with the appellant's Assignment of Error II, indicating that the evidence fails to support a

guilty finding for Specification 2. As we indicated above, this Court may affirm only those findings of guilty that are correct in law and fact. Article 66(c), UCMJ. Two young girls and three women, all neighbors of the appellant, testified that over a period of several months they had seen the appellant standing naked in his garage with the door open while staring directly at the street, or in one case standing at the open gate to his yard, as they passed his house. Some of their recollections are supported by two civilian police officers. One officer testified that he responded to such a complaint against the appellant during the fall of 1992. A second officer testified that when he responded to the 7 January 1993 complaint, the appellant admitted to him that he had been in his garage several times when naked. Defense witnesses testified that the two girls and two of the women had reputations as being untruthful persons. The trial judge properly instructed the members regarding credibility of witnesses and the appellant's good character evidence. We find that the evidence supporting the guilty finding for Specification 2 is legally and factually sufficient.

Assignment of Error VII and VIII are without merit. We find that the staff judge advocate complied with R.C.M. 1106 in providing the convening authority with his initial and supplemental recommendations. We also find that the convening authority was aware of the appellant's authorized awards because they were documented in the record of trial and the convening authority considered the record of trial before taking action. *See* promulgating order dated 22 February 1994.

The Sixth Amendment to the United States Constitution and Article 27, UCMJ guarantee the

appellant the right to effective assistance of counsel. *United States v. Ingham*, 42 M.J. 218 (1995). To prevail on the issue of ineffective assistance of counsel the appellant must first overcome the strong presumption of effective assistance by establishing that counsel's acts or omissions were outside the wide range of professionally competent assistance. *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). If that threshold burden is met, the appellant then must establish that counsel's deficient performance prejudiced his defense by depriving him of a fair trial. Outcome of the trial as the sole focus is not appropriate. *Strickland v. Washington*, 466 U.S. 688 (1984); *Lockhart v. Fretwell*, 113 S.Ct. 838 (1993).

Assignments of Error IX and X are without merit. We find that the appellant has not met the threshold burden of establishing that his civilian defense counsel's performance was ineffective. It is fundamental that an accused must make forum decisions. Indeed there is no claim that the appellant did not personally make the decision to be tried by members. Instead, there is only a complaint about the tactical advice allegedly given to the appellant by his civilian counsel. Second guessing such a recommendation by the civilian counsel with 20/20 hindsight after a bad result and making the simple claim that the civilian counsel should have obtained a psychological evaluation prior to trial does not satisfy the threshold burden imposed on the appellant by *Strickland*. *United States v. Sanders*, 37 M.J. 116 (C.M.A. 1993), *cert. denied*, 114 S.Ct. 600.

Assignment of Error XI is without merit. There is no evidence in the record to support such an allegation.

Assignment of Error XII is without merit. R.C.M. 1103(b)(2)(D) defines what constitutes a complete record of trial. The record in the instant case is complete. R.C.M. 1103(b)(3)(B) also requires that certain items be attached to the complete record of trial, including defense exhibits that are marked and referred to on the record but not received. Defense Exhibit GGGG was referred to but not offered. Record at 229. We find no prejudicial error. Additionally, the videotape mentioned above was referred to but not marked or offered. We find no prejudice to the appellant because the videotape was not attached to the complete record. In lieu of the appellant's shorts being attached to the record, a true description of those shorts, contained in Defense Exhibit BBB, is appropriate pursuant to R.C.M. 1103(b)(2)(D)(v). The court reporter's incorrect indication that Defense Exhibit PPP was not admitted is not prejudicial error.

Assignment of Error VI is also without merit. We find that a sentence in this case which includes an unsuspended bad-conduct discharge is appropriate.

Accordingly, the finding of guilty for Specification 1 of the Charge is set aside and Specification 1 is dismissed. The findings of guilty for Specification 2 of the Charge and the Charge are affirmed. We next turn to the sentence.

Sentence reassessment is within the province of the Court. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994); Article 66(c), UCMJ. When prejudicial error occurs at the trial level, we must first try to determine what the sentence would have been absent the error. If we cannot make that determination, we must order a

rehearing on the sentence. If we can determine that the sentence would have been at least a certain magnitude, we can reassess and affirm a sentence of a severity no higher than that which would have been adjudged absent the error. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). In reassessing, we must ensure not only that the sentence is appropriate, but also no greater than that which would have been imposed absent prejudicial error. Reassessment does not necessarily mean reduction of the sentence. *Sales*.

We find that we can determine that the sentence would have been a certain magnitude absent error. We therefore will reassess the sentence to ensure that it is not only appropriate but also no greater than that which would have been imposed absent the error. We are convinced beyond a reasonable doubt that our reassessment will render harmless any error affecting the sentence. Upon reassessment, the sentence as approved below is affirmed.